

The Comptroller General of the United States

Washington, D.C. 20548

## **Decision**

Matter of:

Comdyne I, Inc.

File:

B-232574

Date:

December 21, 1988

## DIGEST

1. Protest of agency's decision not to waive a first article testing requirement is denied where the 9-year old first article test report submitted in support of waiver request was for a product manufactured under a different process with a different design at different facilities for a predecessor company, and the other first article test reports submitted were for smaller or larger products, were tested by other agencies, and may not have been for a product identical to the product requested.

2. Where agency-level protest that awardee is not an approved source as required by solicitation was filed with the contracting agency more than 10 days after the protester knew or should have known basis of protest and thus was untimely, subsequent protest to General Accounting Office on same ground also is untimely.

## DECISION

Comdyne I, Inc., protests the award of a contract to Corbin Superior Composites under request for proposals (RFP) No. NO0104-88-R-ZG67, issued by the Navy Ships Parts Control Center for air cylinders for inflatable ship lifeboats. Comdyne objects to the Navy's decision not to waive the first article testing requirement for Comdyne and further asserts that Corbin was not an approved source as required by the solicitation.

We deny the protest in part and dismiss it in part.

The RFP solicited offers for 889 aluminum, spun seamless construction cylinders wrapped in fiberglass with an internal volume of 455 cubic inches (cu. in.). The potentially explosive cylinders are used on ship lifeboats to inflate primary and secondary tubes. The solicitation

required a first article test and report. However, the Navy also reserved the right to waive first article test requirements in the event award was made to a current or prior producer of articles "identical or similar" to those required by the solicitation and to determine whether articles previously supplied by an offeror were "similar" to the cylinders required under the solicitation. The RFP also contained a clause stating that only sources previously approved by the government were solicited and outlining the procedure for obtaining source approval. This clause, the Navy states, was inadvertently included in the solicitation since it was not the Navy's intent to require that any offeror be source-approved.

The Navy received four offers by the January 29, 1988, closing date. Comdyne offered the lowest price for the cylinders contingent on waiver of the first article requirement. Corbin offered the lowest price with first article testing.

For purposes of obtaining first article waiver Comdyne identified first article tests completed under two prior contracts: a first article test report dated April 23, 1979, for a 455 cu. in. cylinder produced by Comdyne's predecessor company, Corbin Sales Corporation, under a Navy contract; and a report dated April 25, 1986, under a Defense Logistics Agency (DLA) contract for a 250 cu. in. cylinder which, Comdyne states, conformed to the same military specification as required for the 455 cu. in. cylinder.

The Navy decided not to waive first article testing for Comdyne because Comdyne itself had never supplied the 455 cu. in. cylinder directly to the Navy, and the first article test reports relied on by Comdyne were not current. The Navy then awarded a contract to Corbin on July 5, 1988. Comdyne protested the failure to waive first article testing to the Navy by letter dated July 12, and supplemented its protest on August 8, alleging that Corbin was not an approved source. Comdyne's initial protest to the Navy was denied on September 2; Comdyne's supplemental protest issue was not addressed. Comdyne filed its protest with our Office on September 12, raising both issues.

Comdyne first argues that the Navy improperly refused to waive first article testing for its product. Comdyne acknowledges that its manufacturing process, cylinder design, facilities and management have changed since the 1979 first article test on the 455 cu. in. cylinder, but states that the changes have been improvements. Comdyne further asserts that it has supplied the 455 cu. in.

cylinder to the Navy under two 1988 contracts and one 1982 contract where first article testing was waived.

Comdyne also maintains that, although its 250 cu. in. cylinder was produced under a DLA contract, it was distributed to the Navy; that the first article test on the cylinder is valid since it was performed on April 25, 1986, less than 2 years before the closing date for receipt of offers on this procurement; and that the smaller cylinders are of similar design to the 455 cu. in. cylinder. Comdyne also relies on first article test reports for 550 cu. in. and 285 cu. in. cylinders produced for the Department of Transportation (DOT) which qualified on July 1, 1981, to a DOT standard which, Comdyne argues, is identical in all material respects to the Navy's specification for the 455 cu. in. cylinder.

Finally, Comdyne maintains that two quality deficiency reports pertaining to the cylinder relied on by the Navy to support its decision not to waive first article testing are not relevant since they were not raised until after the waiver decision was made.

The Navy responds that although Comdyne asserts that the changes that have been made to the 455 cu. in. cylinder are improvements, nonetheless the first article test report it relies on is 9 years old, the cylinder was produced at a different facility under different management, and, as Comdyne acknowledges, its manufacturing processes and cylinder design have changed since 1979. In addition, the Navy asserts that the 455 cu. in. cylinders supplied to the Navy under the 1982 contract were manufactured by Corbin Sales Corporation, not Comdyne, and the cylinders supplied under the two 1988 contracts were for local Navy maintenance activities which do not require appropriate testing such as that conducted by the Navy Ships Parts Control Center in its capacity as the Navy's wholesale inventory manager responsible for the quality of the replacement cylinders.

With respect to the 250 cu. in. cylinders manufactured by Comdyne, the Navy notes that the 455 cu. in. cylinder is nearly twice the size of the smaller cylinder and that the Navy has no assurance that the cylinders would be identical and would meet the Navy's safety requirements since they derive their strength from fiberglass windings of a particular configuration and tension. The Navy further asserts that the 285 cu. in. and 550 cu. in. cylinders which Comdyne manufactured to the DOT standard were of a different size and were tested to another non-military agency's specification.

Finally, the Navy notes that in light of the fact that the cylinder is a critical safety item which is highly pressurized and potentially explosive, the receipt of two product quality deficiency reports citing cracked fiberglass wrapping and unraveled hoop wrapping in May and June 1988, as well as several recent incidents of air cylinder explosions on Navy ships, validate the Navy's decision to require first article testing, whether or not those incidents were raised before the decision was made.

An agency's decision to waive or not to waive first article testing for a particular offeror is subject to question only where it is shown to be unreasonable. Honeycomb Company of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579. Because the waiver clause does not confer upon offerors any right to a waiver and first article testing is for the protection and benefit of the government, we have generally been more demanding in our assessment of challenges to the denial of a waiver and have utilized a more stringent standard under which we will not question a determination not to waive first article testing absent bad faith, fraud or a clear showing of an abuse of discretion. Airline Instruments, Inc., B-223742, Nov. 17, 1986, 86-2 CPD ¶ 564.

Federal Acquisition Regulation § 9.303 states that first article testing may be appropriate where a contractor has not previously furnished a product to the government, or where the product acquired under a previous contract developed a problem during its life, was not produced for an extended period of time, or changes in processes or specifications for the product have been made. With regard to the first criterion, the contract history of a predecessor company may qualify a successor company for waiver of first article testing based on the identity or similarity of the companies' manufactured products, facilities, management, staff, production and quality control processes. Power-Trol, Inc., B-227954, Oct. 5, 1987, 87-2 CPD ¶ 335.

In our view, the Navy's decision not to waive first article testing for Comdyne was reasonable. First, Comdyne's 1979 first article test report was, by Comdyne's own admission, for a 455 cu. in. cylinder manufactured under a different process, at different facilities, for a predecessor company with different management, and for a cylinder of a different design. Based on that report, Comdyne would not qualify for the status of a successor company for waiver of first article testing even if its first article test had not been conducted 9 years ago. Second, Comdyne's first article test reports on the 250 cu. in. cylinder under the DLA contract, and the 285 cu. in. and 550 cu. in. cylinders

produced to the DOT standard, were for smaller or larger cylinders, the products were tested by agencies other than the Navy, and the configuration and tension of those cylinders may not have been identical to the 455 cu. in. cylinders to be manufactured to the Navy's specifications. Accordingly, in light of the pressurized and potentially explosive nature of the inflating cylinder to be used on lifeboats, a safety-related item, we see no reason to question the Navy's decision not to waive the requirement for first article testing for Comdyne's cylinders.1/

Comdyne's additional contention that Corbin is not an approved source as required by the RFP is untimely. The issue was first raised in Comdyne's August 8 letter to the Navy, more than 10 days after its initial agency-level protest dated July 12, when, at the latest, Comdyne knew that award had been made to Corbin. The issue thus was not timely filed with the Navy, and, as a result, its subsequent protest to our Office also was untimely. See Bid Protest Regulations, 4 C.F.R. §§ 21.2(a)(2) and (3) (1988).

In any event, this argument is without merit. The Navy states that the source approval clause was included inadvertently and that in fact source approval was not required. In addition, according to the Navy, inclusion of the source approval clause had no impact since none of the offerors, including Comdyne and Corbin, is an approved source for the cylinders. Comdyne disagrees, arguing that only it is an approved source. Even assuming, however, that Comdyne is an approved source and Corbin is not, we fail to see how the Navy's inclusion of the source approval clause and subsequent waiver of the requirement in any way prejudiced Comdyne since it could have had no effect on Comdyne's preparation of its proposal. See Sperry Corp., B-224351 et al. Sept. 26, 1986, 86-2 CPD ¶ 362.

The protest is denied in part and dismissed in part.

James F. Hinchman General Counsel

<sup>1/</sup> As noted above, the awardee, Corbin, also will be required to undergo first article testing.